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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

WILLARD, SUTHERLAND & COMPANY, appellant, *v.* THE UNITED STATES. } No. 209.

WILLIAM C. ATWATER AND COMPANY, Inc., appellant, *v.* THE UNITED STATES. } No. 218.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

These are appeals from judgments of the Court of Claims dismissing the petition in each case upon findings of fact made after trial of the issues. The questions involved in both appeals are so similar, if not practically alike, that the United States presents but one brief in answer to the two briefs of the appellants, filed in the respective appeals, No. 209 and No. 218.

In the first case, No. 209, the plaintiff sued the United States to recover the sum of $3,650, the

difference between the contract price and the current market price of certain coal which it furnished to the United States, and claimed to be 1,000 tons in excess of the amount required under its contract. (P. 3.)

From the findings of the Court of Claims it appears that the plaintiff is a copartnership composed of Le Baron S. Willard and John E. Sutherland, doing business under the firm name and style of Willard, Sutherland & Company, and is and was engaged in the mining and shipping of coal with its principal place of business in the city of New York and with operating branches in Philadelphia, Baltimore, Newport News, and Boston. (First finding, p. 10.)

In the spring of 1916 the Navy Department, being desirous of procuring contracts for coal for that department for the next ensuing fiscal year to be delivered in varying quantities at different stations, issued its invitation for bids in the form of a schedule numbered 9485, containing general specifications and conditions and printed forms of proposals for deliveries in stated quantities at 10 different ports or stations. Included therein and designated as "class 18" was a form of proposal for the furnishing of 600,000 tons of steaming coal to be delivered f. o. b. vessels or barges under chutes at respective piers, Hampton Roads, Va.

The general specifications contained the following provisions under the subhead "Quantities estimated":

> It shall be distinctly understood and agreed that it is the intention of the contract that

the contractor shall furnish and deliver any quantity of the coal specified which may be needed for the naval service at the places named during the period from July 1, 1916, to June 30, 1917, irrespective of the estimated quantities stated, the Government not being obligated to order any specific quantity.

The estimated quantities have been arrived at from the records of previous purchases. While they represent the best information obtainable as to the quantities which will be required during the period covered by the contract, they are estimated only and are not to be considered as having any bearing upon the quantity which the Government may order under the contract.

Under the subhead "Reservations" appeared the following:

The Government reserves the right to reject any or all bids, and in accepting any bids for the different ports of delivery named the right is also reserved to make such distribution of tonnage among the different bidders for suitable and acceptable coals for the naval service as will be considered to be for the best interests of the Government.

Under the subhead "Notes" appeared the following:

(a) Bids on less than the entire quantity of coal specified under each class will be received and considered. Such partial bids must state the amount of tonnage it is proposed to furnish, subject to the other conditions of these specifications.

(Second finding, p. 11.)

Department that it would agree to supply 2,180 tons ordered for the *Kennebec* with the understanding that no further assignments would be made to it, that it would thereby be furnishing 1,620 tons more than it was obligated to furnish under its contract, which it was furnishing under protest, and reserving the right to take proper steps in due course for the recovery of the difference between the current market price of the coal and the contract price, and requesting confirmation of the above from the Navy Department upon receipt of which it would give the necessary orders for the loading of 2,180 tons on the *Kennebec*. On June 15 the Paymaster General acknowledged receipt of the plaintiff's letter of the 14th, but not acceding to any proposition therein contained, directed plaintiff as follows:

> Your company will please supply *Kennebec* with fifteen hundred sixty tons coal, or such quantity as may be necessary to bring the total tonnage delivered by you under contract twenty-six four ninety-two up to total estimated quantity plus ten per cent, or total eleven thousand tons. Balance *Kennebec* cargo will be obtained elsewhere.
>
> (Fourth finding, p. 12.)

The plaintiff thereupon furnished to the steamer *Kennebec* 1,560 tons of coal, making the aggregate amount of coal furnished to the United States 11,000 tons. At the time that this amount of coal was furnished to the *Kennebec* the market value thereof was $6.50 per gross ton; 1,000 tons of coal then furnished by the plaintiff to the *Kennebec* was worth

in the market $3,650 in excess of the contract price therefor. (Fifth finding, p. 13.)

Upon the facts found the court concluded, as a matter of law, that the plaintiff was not entitled to recover and, accordingly, directed that its petition be dismissed. and this is an appeal from that judgment.

ARGUMENT.

I.

As the contract has been fully performed by both of the parties to it, the appellant's objection that it is void for lack of consideration and mutuality comes too late, and is unsound. Questions of lack of mutuality and consideration do not apply where a contract has been fully executed. Performance has eliminated any possible original want of mutuality. And even if the contract had not been fully performed, there was no lack of mutuality in it.

Any objection that the contract is unenforceable for lack of consideration and mutuality must be taken before it has been fully performed. It is an established doctrine of law that entire performance of the contract by the party not bound thereby obviates the original lack of mutuality. In the contract herein involved, while there was in fact no lack of mutuality or consideration, and the appellant was, therefore, bound, nevertheless, a lengthy determination of the question of lack of consideration and mutuality in the contract is not required for the reason that we are here dealing with a contract which has been fully performed by both of the parties to it. Appellant has received from the United

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States the sum of $31,350 for having furnished 11,000 tons of coal at $2.85 per ton, the price named in the contract. All the coal contracted for has been delivered and paid for in accordance with the contract. In Ruling Case Law it is stated that:

> If a contract, although not originally binding for want of mutuality, is nevertheless executed by the party not originally bound, so that the party asserting the invalidity of the contract has actually received the benefit contracted for, the latter will be estopped from refusing performance on his part on the ground that the contract was not originally binding on the other, who has performed. (6 R. C. L. 690.)
>
> *Davis* v. *Robert*, 89 Ala. 402, 8 So. 114, 18 A. S. R. 126.
>
> *McIntyre Lumber & Export Co.* v. *Jackson Lumber Co.*, 165 Ala. 268, 51 So. 767, 138 A. S. R. 66.
>
> *Louisville N. A. & C. R. Co.* v. *Flanagan*, 113 Ind. 488, 14 N. E. 370, 3 A. S. R. 674.
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> *Peckham* v. *Lane*, 81 Kans. 489, 106 Pac. 464, 19 Ann. Cas. 369, 25 L. R. A. (N. S.) 967.
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> *Bigler* v. *Baker*, 40 Nebr. 325, 58 N. W. 1026, 24 L. R. A. 255.
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> *Dickson* v. *Stewart*, 71 Nebr. 424, 98 N. W. 1085, 115 A. S. R. 596.
>
> *Krausse* v. *Greenfield*, 61 Oreg. 502, 123 Pac. 392, Ann. Cas. 1914B 115. (6 R. C. L. 690.)

cases of executed contracts, where one has re-
ed the benefit of the consideration for which he
ained, it is no answer to say that plaintiff was
bound by the terms of the original contract to
he act, and that there was, therefore, no mutu-
of obligation.

s eminent an authority as Page states the rule
e:

> If the contract is accepted by doing the act, no objection can be made to the contract upon the ground of want of mutuality. The same act amounts to acceptance, consideration, and performance. In terms of mutuality this is explained by saying that performance has eliminated the original want of mutuality, and as far as such contract has been performed, the rights of the parties to it are to be measured by its terms.
>
> (Page on Contracts, vol. 1, sec. 582.)

he appellant admits that it entered into a contract
deliver to the United States at least 10,000 tons
coal at $2.85 per ton, for which it received full
ment of the contract price, and there has never
n even a shadow of dispute as to the liability of
appellant to deliver the 10,000 tons. It is only
n the 1,000 tons in addition to the 10,000 tons
mated were called for that appellant protested.
ellant now attacks the entire contract for want of
tuality *after* having fully performed it by deliver-
not only 10,000 tons estimated, but also the
0 extra tons in dispute, and after having received

$2.85 per ton from the United States for the entire 11,000 tons. Obviously, appellant's position is wholly untenable and inconsistent. The contract required the delivery of steaming coal irrespective of the quantity stated (10,000 tons) merely as an estimate of future needs; the Government not being obligated to order any specific quantity. The Navy Department required 11,000 tons and in the absence of bad faith, or of mistake or negligence so great as to amount to bad faith, it clearly was justified in exceeding its original estimate of 10,000 tons of coal by calling for the delivery of 1,000 tons more if its needs required it; which they did. *Brawley* v. *United States*, 96 U. S. 168. Surely the 1,000 tons ordered in addition to 10,000 tons estimated did not amount to such an unreasonable increase as in itself would imply bad faith. Some such an additional amount was anticipated as the very terms of the contract show.

That attacks made upon such contracts upon the ground that they are void for want of mutuality are not well founded, is, perhaps, no place better demonstrated than in the clear and convincing language of Judge Downey in delivering the opinion of the Court of Claims in the very recent and similar case of *The Charles Nelson Co.* v. *United States* affirmed by this court on February 19, 1923, wherein he stated:

> The articles called for were about 1,675,000 feet of Douglas fir of such sizes or grades as

might be ordered, and the contract contained the following clause:

"It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantities of Douglas fir which may be ordered for the naval service at the place named during the period ending December 31, 1917, irrespective of the estimated quantity named, the Government not being obligated to order any specific quantity of Douglas fir contracted for."

The plaintiff first contends that this clause is void for want of mutuality in that the United States was not obligated. Such a contention is not tenable. The purpose of the contract was to procure such lumber during a given period as might be needed at a place where lumber had always been needed and where, so far as human foresight could know, lumber would be needed during the period covered by the contract. The plaintiff, with former experience under such contracts, sought by its bid the right to supply such needs, its contract secured to it such rights, and they were enforceable thereunder. But, however that may be, it is certainly too late for plaintiff to raise such a question after it has furnished under the contract all which, according to its construction, it was obligated to furnish and been paid therefor at the contract price.

In the Nelson case, Chief Justice Taft, delivering the opinion of the court, stated:

The plaintiff denies that the writing signed by it was a binding contract, because there

was no mutuality of obligation. The Government answers this by citing the case of *United States* v. *Purcell Envelope Company*, 249 U. S. 313. In that case the Post Office Department invited bids "for furnishing stamped envelopes and newspaper wrappers in such quantities as may be called for by the department during a period of four years beginning on the first day of October, 1898." The bid of the Purcell Company was accepted. The formal contract was signed by the company and bond given. Subsequently the Postmaster General refused to sign this contract, and bought the envelopes and wrappers elsewhere. This court held that the acceptance of the bid made the contract, that the words above quoted must be construed to mean that the company should furnish all the envelopes and wrappers of the specified sizes which the department would need during the four years' period, and that the Government was as much bound to take the envelopes and wrappers as the bidder was bound to furnish them.

The precise question of lack of mutuality in the contract was raised in the case of *Golden Cycle Mining Company* v. *Rapson Coal Mining Company*, 188 Fed. 179, 182, 183, wherein it was held by Circuit Court of Appeals for the Eighth Circuit that an agreement by one party to furnish and the other party to purchase all the coal of a stated kind the second party "may use" in the operation of a mine during a limited time was valid, and binds the purchaser to take from the seller all the coal that may be needed

or required in the conduct of such business during the time specified. The case was heard before Judges Van Devanter and Hook, Circuit Judges, and Carland, District Judge, and decided by a *per curiam* opinion, wherein it was stated:

> In order to reverse the judgment below, counsel for plaintiff in error urges the proposition that the contract sued on is not enforceable, because the respective promises made by the parties constituting the only consideration supporting the same are not mutually binding, and that the contract is nudum pactum. We think the word "use" in the language of the contract is equivalent to the words "needed, required," or "consumed," and brings the agreement of the parties within the rule enunciated by this court in the case of *Cold Blast Transportation Co.* v. *Kansas City Bolt & Nut Co.*, 114 Fed. 81, 52 C. C. A. 25, 57 L. R. A. 696. It is said in the case last cited that:
>
> "An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer."
>
> The court cited in support of said rule *Wells* v. *Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; *Minnesota Lumber Co.* v.

Whitebreast Coal Co., 160 Ill. 85, 43 N. E.
31 L. R. A. 529; *Parker* v. *Pettit*, 43 N
Law, 512. This rule was also approved in
case of *A. Santaella & Co.* v. *Otto F. L*
Co. et al., 155 Fed. 719, 84 C. C. A. 145,
decided by this court. We therefore ar
the opinion that the agreement above
forth constituted a valid contract on the
of the mining company to purchase and on
part of the coal companies to supply all
lignite coal needed or required by the mi
company in the operation of its mines
reduction works during the time specifie
the contract.

II.

A consideration of the contract clearly demonstrates "10,000 tons of coal" was specified therein merely a estimate of the next year's needs, and that the contr was therefore obligated to furnish coal in an amount rea ably in excess of the "10,000 tons" estimated if the n of the United States required it, which they did.

Appellant contends that it was not obligated
deliver coal to the United States in excess of 10,
tons; that having in fact delivered 11,000 tons, i
therefore, entitled to additional compensation for
1,000 alleged excess tons based on the differe
between its market value and the contract p
which it received.

That "*10,000* tons" was stated in the cont
merely as an estimate of the amount which the N
might need in the ensuing year is as clear as
English language can make it.

The contract states in so many words (R. 5, 6, 7):

QUANTITIES ESTIMATED.

It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantity of the coal specified which may be needed for the naval service at the places named during the period from July 1, 1916, to June 30, 1917, irrespective of the *estimated quantities stated*, the Government *not* being *obligated* to order any *specific* quantity. [Italics ours.]

The estimated quantities have been arrived at from records of previous purchases. While they represent the best information obtainable as to the quantities which will be required during the period covered by the contract, they are estimated only, and are not to be considered as having any bearing upon the quantity which the Government may order under the contract.

* * * * *

Bids on less than the entire quantity of coal specified under each class will be received and considered. Such partial bids must state the amount of tonnage it is proposed to furnish, subject to the other conditions of these specifications.

The Navy had no way of determining just exactly how much coal it *would* need during the next year and, therefore, it could only contract for an estimated amount as based upon the needs of previous years. The contract provided in substance that the contractor shall furnish in the future such amount of

coal as the future needs of the Navy might requir during the period stated. The Navy Departmen had no reason to believe that it would require n more than 10,000 tons, and, knowing this, it simpl named 10,000 tons as an estimate of future needs and was careful to state in the contract that th Government was not obligated to order any *specifi* quantity, and that the contractor should furnis and deliver *any* quantity of the coal irrespective o "*the estimated quantity stated.*" The quantity state or "specified" as such "estimated quantity" wa "10,000 tons."

Under these circumstances the United State finding that its future needs required 11,000 ton instead of 10,000 tons, requested the contractor t furnish the additional 1,000 tons in excess of th 10,000 tons previously estimated from its needs i previous years. The appellant, under protest, fur nished the additional 1,000 tons, for which it re ceived the contract price per ton. Just why th United States could not order under the contrac 1,000 tons in excess of the 10,000-ton estimate i difficult to conceive. The 10,000-ton estimat proved to be quite an accurate one, and the Govern ment has not in any way grossly or unreasonabl exceeded its estimate by calling for 1,000 tons more

It is respectfully urged that under this contrac the appellant was clearly obligated to furnish th United States 11,000 tons of coal at $2.85 pe ton. This it has done, and it has been paid it price, as provided in the contract. It asks fo

more. It has been paid in full; not another cent is owing to it from the United States.

CONCLUSION.

It has been, we respectfully urge, clearly established that the contract was certainly not void for want of mutuality; and a construction of its terms conclusively shows that the appellant was obligated by it to furnish and deliver the 11,000 tons of coal called for by the United States. This being true, no protest against the performance of such a binding contract is pertinent, or necessary to be here considered.

Appeal No. 218, *William C. Atwater and Company, Inc., Appellant,* v. *United States,* was heard and decided with the preceding case. The plaintiff sued the United States to recover the sum of $73,964.48, the difference between the contract price and the current market price of certain coal which it furnished to the United States and which it claimed to be in excess of the amount required under its contract, 200,000 tons. As this case is based upon precisely the same grounds as the Sutherland case, it is somewhat difficult to understand just why the appellant herein has filed a separate brief. As stated by Justice Downey in delivering the opinion of the Court of Claims: "The claim made here, as in the Sutherland case, is for the market price for all coal furnished in excess of the estimated 200,000 tons * * * Upon the authority of the Sutherland case the plaintiff's petition must be dismissed."

STATEMENT OF THE CASE.

The plaintiff is and has been at all times herein mentioned a corporation of the State of New York engaged in the business of shipping Pocahontas smokeless coal and coke, having its office and principal place of business at No. 1 Broadway, New York City, and operating branch offices in Boston, Norfolk, Cleveland, Bluefield, London, and elsewhere. (First finding, pp. 11, 12.)

In the spring of 1916 the Navy Department, being desirous of procuring contracts for coal for that department for the next ensuing fiscal year to be delivered in varying quantities at different stations, issued its invitation for bids in the form of a schedule numbered 9485, containing general specifications and conditions and printed forms of proposals for deliveries in stated quantities at 10 different ports or stations. Included therein and designated as "class 18" was a form of proposal for the furnishing of 600,000 tons of steaming coal to be delivered f. o. b. vessels or barges under chutes at respective piers, Hampton Roads, Va.

The general specifications contained the following provisions under the subhead "Quantities estimated":

> It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantity of the coal specified which may be needed for the naval service at the places named during the period from July 1, 1916, to June 30, 1917, irrespective of the estimated quan-

tities stated, the Government not being obliged to order any specific quantity. The estimated quantities have been arrived at from the records of previous purchases. While they represent the best information obtainable as to the quantities which will be required during the period covered by the contract, they are estimated only and are not to be considered as having any bearing upon the quantity which the Government may order under the contract.

Under the subhead "Reservations" appeared the following:

The Government reserves the right to reject any or all bids, and in accepting any bids for the different ports of delivery named the right is also reserved to make such distribution of tonnage among the different bidders for suitable and acceptable coals for the naval service as will be considered to be for the best interests of the Government.

Under the subhead "Notes" appeared the following:

(*a*) Bids on less than the entire quantity of coal specified under each class will be received and considered. Such partial bids must state the amount of tonnage it is proposed to furnish, subject to the other conditions of these specifications.

(*b*) Contractors will not be held responsible for fulfillment of their contracts during any war in which the United States may be engaged and which may affect them, or if prevented from doing so by strikes or combina-

> tions of miners, laborers, or boatmen, accidents at the mines, or interruption or shortage of transportation. In such cases the obligation to deliver coal under their contracts will be canceled to an extent corresponding to the extent or duration of such war, strikes, combinations, accidents, interruption, or shortage, and no liability shall be incurred by the contractors for damages resulting from their inability to fulfill their contracts on account of the aforementioned causes.
>
> (Second finding, pp. 12, 13.)

The plaintiff on said form submitted its proposal for the furnishing of 200,000 of said 600,000 tons at $2.80 per ton, and was notified of the acceptance of its proposal to furnish said amount. On June 5, 1916, a contract numbered 26,488, and made a part of the petition herein by reference as Exhibit A, was entered into between the parties. The contract in its physical construction was made up largely of portions of the general specifications, notes, etc., and the printed proposals contained in said schedule numbered 9,485, which were clipped therefrom and pasted on and thus made a part of the contract, and the paragraphs quoted in Finding II were thus made a part thereof. (Third finding, p. 13.)

On March 26, 1917, plaintiff was informed by the Paymaster General of the Navy that it had been ascertained that the quantity estimated in its contract would be exceeded by about 10 per cent. In reply to this communication the plaintiff expressed its surprise, stated that it had not bid on tonnage

in excess of 200,000 tons, called attention to heavy curtailment in production at its mines, due to shortage of cars and labor, because of which it had only been able to deliver 75 per cent of other contracts, in view of which it was felt by its operatives that they had met in full their obligations to the Government by delivering 100 per cent of the 200,000 tons during the contract period. In reply thereto the Paymaster General of the Navy cited quoted provisions of the contract as authority for the requiring thereunder of an additional tonnage over and above the 200,000 tons, stated that the excess tonnage required was being prorated and the same requirements were being made of other contractors, and that the contract price must apply to the total requirements during the fiscal year.

On April 17, 1917, the plaintiff called attention to the "Relief clause" in the contract, "Notes (*b*)," (Finding II), submitted a statement as to available car supply and maintained that on that basis it was only obligated to deliver up to April 1, 1917, 148,357 tons, whereas it had actually delivered to said date 160,377 tons, a claimed excess of 12,020 tons, and stated that "the total of 220,000 tons above referred to is subject to the reduction of 12,020 tons, making the actual tonnage deliverable by us under our contract 207,980 tons." To this communication the Navy Department replied by letter of April 30, insisting that the 10 per cent additional must be delivered under the contract, and in reply to the

claim based on transportation conditions (under note (*b*) of the contract) informed the plaintiff that—

> It can not be recognized that you are entitled to any relief on account of such shortage of equipment as may have been experienced; as, in this respect, the Navy is accorded preferential treatment, and this department has not failed to obtain the cars required by its suppliers when requests for cars to move Navy tonnage have been received.

Replying to this letter of the Navy Department the plaintiff stated that it did not agree with the Navy Department, but admitted that the Navy Department had for some time been accorded preferential treatment in the matter of cars and conceded that the preferential arrangement be related back to January 1, 1917, and on that basis stated that "the total of 220,000 tons requisitioned by the department under our contract is therefore subject to reduction to the extent of 8,219 tons, making the actual tonnage deliverable under the contract 211,781 tons." On April 26, 1917, the Navy Department informed the plaintiff that it was entirely impracticable for the department to recede from its request for the 10 per cent additional over the estimated quantity in the contract. On May 22, 1917, the plaintiff, acknowledging an assignment to it on 10,000 tons to be delivered at Lamberts Point between June 1 and 10, stated the condition of its contract, showing 204,430.19 tons delivered and assignments to barges of 2,650 tons, a total of 207,080.19 tons, and stating that "The above assignment added to

is tonnage will make a total of 217,080.19 tons, ving 2,920 tons still to go all rail."

On June 2, 1917, plaintiff wired the department ferring to recent telegrams and saying:

> We beg to call attention to department's notice to us under date March twenty-sixth we would be required to deliver contract tonnage plus ten per cent, eighty-two hundred nineteen tons of which by reasons of short car supply we are delivering under protest. With completion of your requisition for ten thousand tons May twenty-first, two hundred and twenty thousand tons will have been delivered, being eighty-two hundred nineteen tons in excess of tonnage required to complete contract.
>
> (Fourth finding, pp. 13, 14.)

The plaintiff delivered to the Navy Department 9,990 tons of coal, being 19,990 tons in excess of e estimated quantity stated in the contract; 1,781 tons (being 220,000 tons, less 8,219 tons) ere billed at $2.80 per ton, the contract price, and e remainder was billed at $6.25 per ton. All was aid for at the contract price, but the plaintiff pro- sted acceptance of the contract price for the excess er 211,781 tons. At the time the amount of coal er 200,000 tons was delivered to the Navy De- rtment the market value thereof was $6.50 per n; 19,990 tons of coal then furnished by the laintiff to the Navy Department were worth in e market $73,964.48 in excess of the contract ice therefor. (Fifth Finding, p. 14.)

CONCLUSION OF LAW OF THE COURT OF CLAIMS.

Upon the facts found the court concludes, as matter of law, that the plaintiff is not entitled to recover, and that its petition herein ought to be dismissed with judgment against it for the cost of printing, to be taxed by the clerk, and judgment is directed accordingly.

OPINION.

Judge Downey, delivering the opinion of the court, said:

This case as presented is in essential respects like and must be controlled by the case of *Willard, Sutherland & Company* v. *United States*, decided November 7, 1921, and detailed discussion will, therefore, not be deemed necessary.

The chief difference is found in the fact that this plaintiff seems to have conceded the right of the defendant to require them to furnish an additional quantity of coal over and above the estimated quantity stated in their contract, but claimed that under another clause of the contract they were relieved from furnishing 8,219 tons, and as to that only they demanded the market price. If the case were presented here on the basis of the contention thus made we would have difficulty in finding merit in it, but that theory is abandoned and the claim made here, as in the Sutherland case, is for the market price for all coal furnished in excess of the estimated 200,000 tons. The effect upon plaintiff's case, as presented, of some of the facts found as to its attitude during the progress of the con-

tract and its complete departure now from its claimed rights, then, both in theory and amount, might be discussed, but, apparently, no good purpose could be served. Upon the authority of the Sutherland case the plaintiff's petition must be dismissed.

Graham, Judge; Hay, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

CONCLUSION.

This claim is based precisely upon the same grounds the Sutherland case. It was instituted to recover e current market price for all coal furnished in cess of the estimated 200,000 tons named in the ntract, and upon authority of the Sutherland case e judgment of the Court of Claims herein should, e respectfully urge, be affirmed.

JAMES M. BECK,
Solicitor General.

RUFUS S. DAY,
Special Assistant to the Attorney General.

APRIL, 1923.

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